No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

BRIEF OF LIFE TENANTS APPELLEES IN ANSWER TO REPLY BRIEF OF APPELLANTS.

WILLIAM O. SMITH,
LOUIS J. WARREN,
EDWARD M. LEONARD,
Attorneys for Life Tenants, Appellees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

BRIEF OF LIFE TENANTS APPELLEES IN ANSWER TO REPLY BRIEF OF APPELLANTS.

Now that the subleases and contract introduced in evidence in the Circuit Court have been added to the record on appeal we deem discussion proper to the point that they do not constitute an assignment of the head leases nor a conversion of the trust estate as contended for a fourth proposition in reply brief for appellants, and in making answer we deem it advisable to briefly answer the other points contended for in appellants reply.

I.

SCOPE OF THE APPEAL.

With appellants contention, that there can be no appeal from a part of a final decree and that the

final decree brings up for review the entire proceeding in the Courts below, we agree. But was not the final decree only regarding the Ookala lease? And were not all matters regarding the Mokuleia lease made final by the former decision of the Supreme Court of Hawaii? We contend that an affirmative answer is correct in each instance. Moreover, we contend that if by reason of this appeal this Court finds that manifest error has been committed, it will direct the entry of a decree which will correct that error even though it be not agreeable to the party appealing.

II.

A LATENT AMBIGUITY.

Appellants quote from the first opinion of the Supreme Court of Hawaii, and contend that this opinion is conclusive that the will is not ambiguous. They state, page 3:

> "Any question of considering surrounding facts and circumstances or the nature of the estate has been finally determined and decided against appellees by the court below."

We submit that any opinion as to "facts" or "circumstances" regarding the nature of the estate which have been given expression to by the Court below, is not binding upon this Court.

Hendry v. Perkins, 59, C. C. A. 266, 123 Fed. 268.

Moreover, when the opinion quoted from was rendered that portion of the testimony of Mr. Focke (Tr. 138-140) which shows clearly that the testator had made his will in view of impending death, had not yet been given and was not before the Court.

Appellees are here seeking to sustain the *decree* as regards the Mokuleia lease and, if that decree is sustainable on *any* ground, it makes no difference whether the lower Court assigned a *different* ground therefor (4 Corpus Juris 1132). The *opinion* of the Supreme Court of Hawaii and the reasoning on which it is based are of no legal consequence; it is the *decree* alone which is important. Hence appellees' argument based on the use of the term "rents" is just as open now as it was in the lower Court. And if the result of sustaining the decree as regards the Mokuleia lease on this ground necessitates a reversal of the decree as regards the Ookala lease, that result is entirely permissible under Hawaiian law where an appeal in equity opens up the whole case "as to any or all of the parties" (Revised Laws of Hawaii, Sec. 2509; *Estate of Kapukini,* 14 Haw. 204, 205; *Spreckels v. Gifford,* 10 Haw. 379, 383).

The cases of *Castle v. Irwin,* 25 Haw. 786, 788, and *Fitchie v. Brown,* 211 U. S. 321, 329, cited by appellants on page 3 of their reply brief, fail to consider the scope of Section 2509 of the Revised Laws of Hawaii nor does it appear that it was pointed out in either of those cases. The most that can be said

of their effect is that an appellee will not be heard to attack a decree, but they do *not* hold that the Court may not modify the decree in favor of such appellee. In this case the argument of the appellees based on the use of the word "rents" in regard to the Mokuleia leaseholds *supports* the decree as regards *that* lease. If this particular argument is sustained, it also overthrows the decision as regards the Ookala lease. This is a situation entirely different from that involved in the two cases cited, where appellees made a direct attack on the decrees involved. Here there is no direct attack on the decree, but merely an attack *necessarily involved* in an endeavor to *support* the principal part of the decree.

The foregoing is, of course, without prejudice to the claim that no decree as regards the Mokuleia lease is involved in this appeal. If the Court holds with appellees on this point, then, under the two cases cited, any attack on the decree as regards the Ookala lease would fail, but only in that event. We must in this connection point out that we fail to agree with appellants in their contention (Reply Brief, pp. 1-2) that the Mokuleia lease is involved in this appeal. It may well be said that no appeal could have been taken as regards the Mokuleia lease until the whole cause was determined, but the decree now appealed from was one in regard to the *Ookala lease only* (Record, pp. 72, 85, 86-87) and

the appeal was in no way directed (as it perhaps might have been) to the prior decree as regards the Mokuleia lease (see main brief of life tenants, pp. 4 to 8 inclusive, fully developing this point).

III.

TRUST ESTATE.

We submit that there has been no effort on the part of appellees to construe the word "estate" to mean the same thing as "rents, income, issues and profits", and we believe it unnecessary to add further argument to the point that the estate consisted of certain personal property which has been converted and two leases, and that from these leases certain rents, income, issues and profits accrued. It cannot be said that the rents, income, issues and profits from the leases are leases themselves.

IV.

THERE HAS BEEN NO CONVERSION BY THE TRUSTEES BY REASON OF SUBLEASES.

Appellants contended, page 22:

> "Since the sub-leases were made for the whole term of the head lease they were in effect a sale or assignment thereof".

This Court has now before it certified copies of the two head leases together with the several sub-

leases which were made and a certain contract regarding the Ookala leasehold. All of these documents as will be seen, were offered and received in evidence as a part of the record on the trial of the case in the Circuit Court.

It will be noted that each of the subleases is for a term less than that of the head lease and that the agreement regarding the Ookala lease is not in the form of a sublease but is simply a planting or crop contract. There can be no doubt but that where a sublease is for a less period than the term of head lease that no assignment can be construed.

16 *R. C. L.* 825, Section 320;
Sexton v. Chicago Storage Co. (Ill.) 21 N. E. 920;
Davis v. Vidal, 105 Tex. 444; 151 S. W. 290; 42 L. R. A. N. S. 1084 (with note);
I Tiffany on *Landlord and Tenant,* 907.

In conclusion, may we reiterate that this Court sitting as a Court of Equity, will view all the surrounding circumstances of trust created by James Gay's will, and in doing so will take into account those facts and circumstances as they existed at the time of making the will, to arrive at the intention of testator. We submit that it cannot by any method of reasoning be said, that James Gay when he directed the drafting of this will and signed it, intended that his wife and children, then minors, would take but six per cent of the rents coming to

him from his investment in leases, and leave the entire sum total of these rents to be accumulated for the purpose of becoming the property of expectant heirs. In other words he did not intend that his wife and seven minor children should get less than $130.00 for their support and maintenance for the entire year following his death, while over $2000.00 would be set aside in the expectation that his then babies should rear children. When he said "rents" he meant all of the rents, as they then existed, leaving full discretion with the trustees as to what portion, if any, of his personal property should in the future be converted for the benefit of grandchildren.

Dated, San Francisco,
July 27, 1923.

Respectfully submitted,
WILLIAM O. SMITH,
LOUIS J. WARREN,
EDWARD M. LEONARD,
Attorneys for Life Tenants, Appellees.